81-2167

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE SEEKONK WATER DISTRICT,
Petitioner,

v.

HERITAGE HOMES OF ATTLEBORO, INC.,
Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a private corporation, which itself "has no racial identity," *Village of Arlington Hts.* v. *Metro. Housing Dev.*, 429 U.S. 252, 263 (1977), has standing under 42 U.S.C. §§ 1981, 1983 to sue based on racial discrimination directed at hypothetical potential purchasers of homes sold by the corporation.

2. Whether a municipal corporation can be held liable for damages under *Monell* v. *Dept. of Soc. Serv. of the City of N.Y.*, 436 U.S. 658 (1978), based solely on the actions and motivation of voters acting directly through a town meeting to decide a public issue.

3. Whether the *Monell* decision, which overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961), applies retroactively.

PARTIES BELOW

At an earlier stage of this case, additional parties were present in the District Court and in the Court of Appeals. Those parties were Roger G. DesVergnes, Barbara R. Mann, Harold G. Devine, Jr. and Paul R. Tortolani. The only parties present in the District Court and Court of Appeals at the time of the trial and judgment sought to be reviewed are those listed in the caption to this petition.

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OPINIONS BELOW

The first opinion of the Court of Appeals was reported at 601 F.2d 9 (1979). The second opinion of the Court of Appeals was reported at 648 F.2d 761 (1981). The opinion of the Court of Appeals on remand from this Court was reported at 670 F.2d 1 (1982). The opinions of the District Court for the District of Massachusetts were reported at 448 F. Supp. 1256 (1978), 463 F. Supp. 686 (1979), and 498 F. Supp 463 (1980). All opinions are reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1982. A timely petition for a writ of certiorari was filed by the respondent on April 26, 1982. This conditional cross-petition was filed within 30 days of the filing of the respondent's petition under Rule 19.5 of the rules of the Court. Jurisdiction in this court is founded on 28 U.S.C. § 1254(1). Jurisdiction in the district court was founded on 28 U.S.C. § 1343.

STATUTES INVOLVED

United States Code, Title 42

§ 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case arises from the refusal of the Seekonk Water District in Massachusetts to include land owned by Heritage Homes in the district and the consequent refusal to provide municipal water services. Heritage purchased undeveloped

land in 1976 and petitioned for inclusion in the district. The petition was put on the agenda of a meeting of all district voters pursuant to Massachusetts law. Although about 13,500 people live in Seekonk, only 74 appeared and voted on the Heritage petition. It was defeated by a vote of 66 to 8.

In 1977, Heritage brought suit under the Federal Civil Rights Acts against the Seekonk Water District alleging that it had been damaged as a result of that vote[1]. The District Court dismissed the original complaint, which alleged claims under 42 U.S.C. §§ 1983, 1985 and the Fourteenth Amendment. 448 F. Supp. 1256, App. at 1a-14a. An amended complaint, asserting a claim under 42 U.S.C. § 1981, was also dismissed by the District Court. 463 F. Supp. 686, App. at 15a-16a. That Court held that a corporation was "not a member of any class traditionally protected by Section 1981." 463 F.Supp. at 686, App. at 15a.

The Court of Appeals reversed. 691 F.2d 9, App. at 17a-32a. Judge Wyzanski, siting by designation and writing for the court, construed the complaint as alleging that Heritage's petition for inclusion had been rejected by the Seekonk voters because a majority believed Heritage would sell the homes built by it to blacks, as it had in the past in developing property in North Attleborough, Massachusetts. While noting Mr. Justice Powell's observation that "a corporation has no racial identity and cannot be the direct target of an alleged discrimination," *Village of Arlington Hts.* v. *Metro. Housing Dev.*, 429 U.S. 252, 263 (1977), Judge Wyzanski concluded that Heritage had stated a cause of action under §§1981 and 1983. With respect to § 1981, the Court of Appeals held that "a person has an implied *right of action* against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites. *A fortiori:* a person has an implied *right of action* against any other person who with a racially discriminatory intent, injures him because he made contracts with non-whites. Because Heritage comes within each of those two rules, it has statutory standing to sue." 601 F.2d at 14, App.

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[1] Roger DesVergnes, president of Heritage Homes, was also originally a plaintiff. He and three individual defendants were dismissed as a result of court rulings and agreement of the parties.

at 25a (emphasis in original). With respect to § 1983, the Court of Appeals held that a state, through a municipal corporation, may not "punish or discriminate against a corporation for its willingness, past or present, to make contracts with blacks." *Id* at 17, App. at 30a. Judge Wyzanski further concluded that the voters of Seekonk were analogous to "a body of stockholders of a private corporation," *id.* at 15, App. at 27a, and that the Water District could be held liable for the acts of the voters since those acts "may fairly be said to represent official policy" under the rule in *Monell* v. *Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 694 (1978).

The case was remanded to the District Court where it was tried without a jury. During the two-day trial, evidence was presented regarding the purchase, development and sale of homes on the plaintiff's land. There was evidence of racial bias in the form of telephone calls from Seekonk residents to local officials. There was also evidence of certain community activity and proof of biased comments made by several voters at the water district meeting which supported an inference of racial bias; however, uncontradicted testimony showed that the officials of the water district recommended inclusion of plaintiff's property. Significantly, there was no evidence that any prospective purchaser of plaintiff's homes was deterred or precluded from purchasing by any acts of the water district or any voters. Indeed, a black family had purchased one of those homes. Heritage showed that it was able to build and sell its homes even though it was not included in the water district, although its costs were increased by drilling private wells.

The District Court, in an opinion written by Judge Caffrey, held that "the water district's refusal to include plaintiff's land within its boundaries was motivated solely by racial considerations." 498 F. Supp. at 467, App. at 39a. That court held that the increased costs to Heritage resulting from drilling private wells had been passed on to the purchasers and plaintiff, therefore, had suffered no compensable damages. The District Court did award plaintiff $100,000 in punitive dam-

ages. It also decreed that Heritage must be included in the district if it so wished.[2]

The Court of Appeals re-affirmed its prior decisions on the scope of §§ 1981 and 1983. It rejected Judge Caffrey's "passing on" analysis and directed entry of a compensatory judgment for plaintiff based on the difference between the cost of wells and the costs had plaintiff's land been included in the district. By a divided vote, with Judge Aldrich dissenting, the Court of Appeals affirmed the punitive damage award. 648 F.2d 761, App. at 42a-47a. This Court granted a petition for a writ of certiorari, vacated the Court of Appeals' judgment and remanded the case for further proceedings in light of the decision in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. ____ (1981). *See Seekonk* v. *Heritage Homes*, ____U.S.____ (1981). On remand the Court of Appeals expressly limited its reconsideration to the punitive damage issue, set aside the judgment for punitive damages and reaffirmed its prior decisions in all other respects. 670 F.2d at 4, App. at 57a.

REASONS FOR GRANTING THE WRIT

Petitioner does not believe this case requires further review by this Court, for reasons set out in the Brief in Opposition to the Petition for Certiorari in No. 81-2058. If, however, that petition is granted, this cross-petition should be granted to review and decide the issues concerning the liability of municipal corporations under the Federal Civil Rights laws which are presented in this case and have not previously been decided by this Court. The issues raised in this cross-petition were also raised in the Water District's prior petition, No. 80-2172. Those issues were not addressed by the Court when it remanded the case, however, and are properly presented for review if respondent's petition is granted.

The first issue presented is the standing of private, profit-making corporations to sue under the Civil Rights laws because

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[2] Heritage's property has in fact been included in the district as a result of this litigation.

of acts resulting from discrimination directed at hypothetical customers. It is significant that no natural persons are parties to this suit. It is axiomatic that the Reconstruction Civil Rights laws were designed to end discimination and insure equality among natural persons. Yet here two legal creatures of the state have, in effect, litigated an allocation of business costs where there is no showing of any actual or potential discrimination against natural persons. If the decision below stands, developers who see a glint of discriminatory motive behind local government action will have a cause of action which, as in this case, could shift their development costs to the taxpayers.

The standing of a corporation to sue under § 1983 was explicitly left open by this Court in *Village of Arlington Heights, supra.* In that case, several plaintiffs including a non-profit corporate developer and a prospective Negro purchaser, challenged the zoning decisions of a municipality. Although the Court held that the corporate plaintiff had suffered an "injury in fact" and met the constitutional requirement for standing, it declined to decide whether the "prudential limitiations" on standing should be relaxed. Writing for the Court, Mr. Justice Powell stated: "As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth* v. *Seldin,* 422 U.S., at 499. But we need not decide whether the circumstances of this case would justify departure from that prudential limitation and permit MHDC to assert the constitutional rights of its prospective minority tenants. See *Barrows* v. *Jackson,* 346 U.S. 249; cf. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229; *Buchanan* v. *Warley,* 245 U.S. 60, 72-73. For we have at least one individual plaintiff who has demonstrated standing to assert these rights as his own... Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." *Village of Arlington Heights, supra,* at 263 and n.9.

The Court of Appeals in this case held, through an extension of *Sullivan, supra,* that Heritage had standing to

challenge a municipal decision which was allegedly based on the belief of some voters that it would sell homes to blacks or had done so in the past. Petitioner submits that the decision below is an unwarranted extension of *Sullivan*. In that case, a white citizen leased a home to a Negro and the community organization refused to permit assignment of pool privileges to the Negro tenant. The white owner was then expelled from the organization. This Court held that the white plaintiff had standing under 42 U.S.C. § 1982 "to vindicate the rights of minorities protected by § 1982." *Id.* at 237.

Ordinarily, plaintiffs are not permitted to assert the rights of third parties. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). That prudential limitation is particularly applicable in this case where there is no evidence that the rights of minorities were in fact injured. In effect, Heritage has shown that some of the voters of the Water District had a bias against blacks, but it has not shown that any blacks were in fact injured or threatened with injury because of the district's failure to include Heritage's land. The consequences of non-inclusion were felt by all purchasers of homes from Heritage, whether black or white. Thus, the interests injured were not those of minorities protected by §§ 1981 or 1983, but only those of Heritage, a corporate entity which cannot be the object of racial discrimination.[3]

The second issue presented is the decision below that a municipal corporation can be held liable if a court concludes that the vote of a small number of local citizens was racially motivated. This decision raises significant issues left open in prior decisions on municipal liability and touches directly on First Amendment freedoms. In *Monell* the Court specifically rejected any vicarious liability for municipal corporations based solely on the misfeasance of employees. That decision was based on the legislative intent behind § 1983 and a concern that imposition of such liability would raise constitutional concerns. *Id.* at 691-93. In this case, the Seekonk Water District has been held liable solely because of the acts of some voters. There is no evidence that any official of the water district acted with any

[3] All of the stock of Heritage is owned by Roger DesVergnes. He is of French, German and Canadian Indian extraction.

discriminatory intent, purpose or effect.[4] It would be ironic indeed for municipal corporations to be held liable for the acts of the voters over whom the corporation can exercise no control whatsoever, when there is no municipal liability for the malfeasance of individual employees whom the corporation can control.

The principal adopted below infringes directly on First Amendment rights. In this case, only 66 people voted against inclusion of the Heritage tract.[5] The evidence showed that even fewer voters spoke on the issue at the town meeting. There is testimony about the specific comments of only 2 or 3 persons who spoke. Based on their comments and testimony concerning acts of Seekonk residents before and after the meeting, the District Court held that the water district's refusal to include Heritage's land was racially motivated.

Evidence of motivation is, of course, illusive. But the mind-reading involved in this case necessarily puts the judiciary directly in the center of political action in its purest form. The Court of Appeals did not cite any precedent for basing governmental liability on the acts of the voters, relying instead on an analogy to corporate-shareholder relationships. The analogy is superficially attractive but it overlooks the constitutional rights that attend voting.

The dangers inherent in basing liability on voters' intentions are similar to the concerns which underlie the doctrine of legislative immunity. In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) the Court reviewed the doctrine and re-affirmed its status under federal law. The Court itself noted that "the holding of this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." *Tenney, supra*, at 377. Citing *Tenney*, the District Court here had held that the votes and conduct at the meeting "do not provide a basis for holding the District vicariously

[4] To the contrary, the records show that the officials of the water district were overruled by the voters.

[5] Two votes were taken at subsequent meetings on renewed motions to include the Heritage tract. Those motions lost by votes of 12-13 and 56-86.

liable." 448 F.Supp. at 1263, App. at 11a. Those concerns about separation of powers and integrity of the legislative process warrant similar concern over judicial scrutiny of voters' motivation. The novel decision of the Court of Appeals warrants review by this Court before it becomes the opening wedge of judicial intrusion into the polling booth.

Finally, if respondent's petition is granted, the Court should decide whether the decision in *Monell, supra,* applies retroactively to cases filed before that decision. Since *Monell* explicitly overruled *Monroe* v. *Pape,* 365 U.S. 167 (1961), it is a candidate for nonretroactive application under the principles discussed in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 105-07 (1971). The impact of retroactive liability for municipal corporations is of sufficient importance to justify giving *Monell* prospective effect only.

Consideration of this issue in the lower courts is quite limited, but there is a divergence in the two reported opinions. In *Aiello* v. *Wilmington,* 470 F.Supp. 414 (D.C. Del. 1979), aff'd on other issues 623 F.2d 845 (3d Cir. 1980), the District Court held that *Monell* had retroactive effect, applying the *Chevron* doctrine. In *Sala* v. *Suffolk,* 604 F.2d 207 (2d Cir. 1979), vacated and remanded for reconsideration, 446 U.S. 903 (1980), the Court of Appeals, analogizing their decision to *Chevron,* held that municipal corporations had an immunity from liability where they acted in "good faith" when the case law at the time of the challenged acts did not suggest the conduct was unlawful.

We recognize that this issue of retroactivity was neither raised nor decided below and that this Court will not normally consider issues raised here for the first time. *See, e.g., United States* v. *Lovasco,* 431 U.S. 783, 788, n. 7. But that practice is not an absolute bar to considering such issues. In "exceptional circumstances," this Court will consider issues which were neither raised nor decided below. *See R. Stern & E. Gressman, Supreme Court Practice,* § 6.27 at 458-61.

CONCLUSION

For reasons set forth in the Opposition to the Petition for Certiorari in No. 81-2058, petitioner does not believe further review by this Court is appropriate. However, if that petition is granted, the issues raised here are equally worthy of review and this petition should also be granted.

Respectfully submitted,

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May 1982

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROGER G. DESVERGNES and
HERITAGE HOMES OF ATTLEBORO, INC.,
Plaintiffs

v.

THE SEEKONK WATER DISTRICT, a municipal corporation, BARBARA R. MANN, HAROLD G. DEVINE, JR., and PAUL R. TORTOLANI,
Defendants

CIVIL ACTION
NO. 77-1251-C

MEMORANDUM
April 14, 1978

CAFFREY, CH. J.

This civil rights action, which seeks both monetary damages and injunctive relief, is brought under 42 U.S.C.A. §§1983, 1985, and the equal protection clause of the Fourteenth Amendment of the United States Constitution. Jurisdiction is invoked under 28 U.S.C.A. §§1331 and 1343,[1] and the amount-in-controversy, exclusive of interest and costs, allegedly exceeds $10,000. Now before the Court are motions by the three individual defendants to dismiss the complaint and for the award of reasonable attorney fees, as well as plaintiffs' motion for a preliminary injunction. By answer, defendant Seekonk Water District has asserted, *inter alia*, the affirmative defenses of lack of jurisdiction and failure to state a claim upon which relief can be granted. At this stage, the material facts alleged in the complaint will be construed in the light most favorable to plaintiffs and taken as admitted. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Harper* v. *Cserr*, 544 F.2d 1121, 1122 (1st Cir. 1976).

Plaintiff Heritage Homes of Attleboro, Inc. (Heritage), is a corporation organized under the laws of the Commonwealth of

[1] Sections 1983 and 1985 of Title 42 do not, as plaintiffs allege, provide an independent source for the Court's jurisdiction apart from 28 U.S.C.A. §1343(1), (3). *See Harrison* v. *Brooks*, 446 F. 2d 404, 407-09 (1st Cir. 1971).

Massachusetts and having a usual place of business in Attleboro, Massachusetts. Plaintiff Roger G. DesVergnes is the president, treasurer, and sole stockholder of Heritage, and a resident of Attleboro. Defendant Seekonk Water District (District) is a municipal corporation established by 1945 Mass. Acts ch. 381. It consists of all the inhabitants who are liable to taxation in the Town of Seekonk and who reside within specified boundaries. The members of the District, through the administrative body of an elected Board of Water Commissioners, regulate the provision and use of water within the District. *Id.* §§1, 2, 9. Water use charges are levied against members by the Commissioners. *Id.* §10. Individual members of the District have the exclusive right to vote on significant matters placed on the agenda of annual and special meetings. Defendants Barbara R. Mann, Harold G. Devine, and Paul R. Tortolani are voting members of the District and residents of Seekonk. Neither of these latter three defendants is alleged to be a state, county or local official.

The complaint declares that Heritage acquired by purchase a tract of land in Seekonk for construction of a moderate-income housing subdivision. On February 1, 1976, prior to the actual purchase, DesVergnes met with two members of the Board of Water Commissioners, informed them of the contemplated housing development, and emphasized to them that a decision by him to go forward with the land acquisition and development was dependent upon a corresponding decision by the District to supply water to the proposed development. The two Commissioners allegedly informed DesVergnes that the District already planned to extend its boundaries to encompass his locus, that existing water supplies were adequate to service the described project, and that the parcel met all the criteria for inclusion within the District, thus making actual inclusion, which only could be effectuated by vote of a majority of the individual District members,[2] "a mere formality" in the minds of DesVergnes and the Commissioners.

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[2] The District's enabling statute grants to the voting members the discretion to consider the merits of an application and decide whether to include or exclude specific parcels from the District:

(footnote continues)

In reliance upon only these oral representations, Heritage purchased the property on April 26, 1976 for $300,000, and DesVergnes obligated himself personally as the guarantor of notes payable to Taunton Cooperative Bank in the amount of $375,000. Heritage then submitted a written application to the Commissioners for formal inclusion of the locus within the District. The Commissioners caused that application to appear as Article 17 in the Warrant for the District's Annual Meeting. The Warrant also contained an Article 18, which sought inclusion within the District of a substantially similar, but apparently noncompeting, parcel that a Monterey Corporation planned to develop separately for moderate-income housing.

The gravamen of plaintiffs' complaint is that after the Warrant for the Annual Meeting was made public, defendants Mann, Devine, and Tortolani began intentionally and knowingly misrepresenting to other voting members of the District that the Heritage subdivision would consist of "Federally subsidized low-income housing," and/or housing consisting of "shacks," designed to attract "low-income" and/or "colored" people to the Town of Seekonk. Defendants allegedly made these misrepresentations with knowledge of plaintiffs' existing financial commitment and of the dire consequences to the corporate and individual plaintiffs if their application were denied. At the Annual Meeting on May 11, 1976, after being informed by the Commissioners that both proposed subdivisions satisfied existing criteria and that water supplies were

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(footnote continued)

> Upon a petition in writing addressed to said board of water commissioners requesting that certain real estate ... located in said town and abutting on said district and not otherwise served by a public water supply be included within the limits thereof, and signed by the owners of such real estate, ... said water commissioners shall cause a duly warned meeting of the district to be called, at which meeting the voters may vote on the question of including said real estate within the district. If a majority of the voters present and voting thereon vote in the affirmative the district clerk shall within ten days file with the town clerk of said town and with the state secretary an attested copy of said petition and vote; and thereupon said real estate shall become and be part of the district ...

1945 Mass. Acts ch. 381, §13.

adequate to service both developments, District members rejected plaintiffs' application to extend the District's boundaries by a vote of 66 to 8. At the same meeting, the voters approved by a vote of 25 to 6 the inclusion within the District of the Monterey Corporation's property. Construction on plaintiffs' development immediately halted and all subsequent efforts to gain inclusion within the District have failed.

Plaintiffs claim that defendants' conduct incited in the voting members class-based, discriminatory prejudice against and fear of the plaintiffs, in particular, and low-income people and racial minorities, in general. It is also alleged that a conspiracy existed whose unlawful purpose was to subvert the regulatory scheme of the District. Plaintiffs conclude their complaint by charging that defendants' action fostered an arbitrary, capricious distinction between Heritage and other water applicants, and caused the vote of disapproval of the Heritage parcel.

As to damages, plaintiffs claim that deprivation of the planned use of their property has caused continuing monetary damages in the sum of $10,000 per month since June 1, 1976. Plaintiffs also claim the imminent and irreparable loss of the assets, goodwill, and future earning power of Heritage, as well as personal insolvency and loss of future earning power on the part of DesVergnes.

For relief, plaintiffs demand:

(1) Judgment against each defendant in the amount of $500,000, plus interest and costs;

(2) a preliminary injunction ordering the District to permit Heritage to extend a presently existing water main to its property at its own expense, and to purchase water from the District at the presently existing rate; and

(3) a permanent injunction mandating that the District extend its boundaries to include the Heritage locus, and supply water to the subdivision and its future owners in the same manner and on the same basis as water is supplied to all other members of the District.

I

Motions to Dismiss

A. *42 U.S.C.A. §1983*

Plaintiffs' complaint concedes that defendant Water District is a municipal corporation created by a special act of the State legislature. Although such an entity may not be able to assert the defense of governmental immunity under all provisions of the Civil Rights Acts, it is well-established that the District's municipal status imposes a jurisdictional barrier to the §1983 claims for monetary and injunctive relief, because the District is not a "person" within the meaning of §1983. *City of Kenosha* v. *Bruno*, 412 U.S. 507, 512-13 (1973); *Monroe* v. *Pape*, 365 U.S. 167, 191-92 (1961); *Sethy* v. *Alameda County Water District*, 545 F.2d 1157, 1159-61 (9th Cir. 1976) (en banc). Accordingly, plaintiffs' §1983 cause of action should be dismissed against the Seekonk Water District because it appears from the face of the complaint that this Court lacks jurisdiction under 28 U.S.C.A. §1343(3), as was alleged in the District's answer. *See City of Kenosha* v. *Bruno, supra* at 513.

The individual defendants move to dismiss plaintiffs' §1983 claim on the ground that the complaint fails to allege the necessary statutory element that the actions of these defendants were performed "under color of any statute, ordinance, regulation, custom or usage of any State or Territory...." 42 U.S.C.A. §1983.

The lone reference to unlawful action by the three individual defendants is found in paragraph 18 of the complaint. At most, the allegation charges that Mann, Devine, and Tortolani, in their capacities as private citizens and as District members, maliciously provoked a class-based, public debate by falsely labeling plaintiffs' proposed housing development as designed for occupancy by low-income and minority persons. The complaint does not assert that at the time of these activities Mann, Devine, or Tortolani were public officials of either the Commonwealth of Massachusetts, Bristol County, or the Town of Seekonk, or were members of the Board of Water Commissioners. Plaintiffs attempt to close this logical gap by arguing

that these private individuals may be held liable under §1983 because they were jointly engaged with a state actor, namely, the Water District, in the deprivation of civil rights. *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 152 (1970), *quoting United States* v. *Price*, 383 U.S. 787, 794 (1966). But the ruling above that the District is immune from §1983 liability leaves no remaining state or local actor with whom these private parties could act in concert under color of state law. *Cf. Downs* v. *Sawtelle*, No. 77-1260, slip op. at 15 (1st Cir. Mar. 30, 1978). However wrongful, purely private conduct, performed not under color of state law, is not a sufficient predicate for federal cause of action under §1983.[3] *Civil Rights Cases*, 109 U.S. 3, 17-18 (1883); *Berrios* v. *Inter American University*, 535 F.2d 1330, 1331 (1st Cir. 1976); *Ouzts* v. *Maryland National Insurance Co.*, 505 F.2d 547, 550 (9th Cir. 1974) (en banc), *cert. denied*, 421 U.S. 949 (1975).

Consequently, plaintiffs' §1983 action against defendants Mann, Devine, and Tortolani should be dismissed for failure to state a claim upon which relief can be granted. *See generally Bell* v. *Hood*, 327 U.S. 678, 682-85 (1946); *Elders* v. *Consolidated Freightways Corp.*, *supra* at 633.

B. *42 U.S.C.A. §1985*

Although plaintiffs have failed to provide a specific citation, the only provision of 42 U.S.C.A. §1985 conceivably

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[3] In an analogous situation, another District Court has observed that:

> It is not enough that the defendant exercises some power possessed only by virtue of his private citizenship. Such conduct, even when wrongful, does no violence to the rights protected by the statutes [42 U.S.C.A. §§ 1983, 1985] here relied upon by the plaintiff. Rather the acts must be such as are a manifestation of an alloy of the power of the state, and possible only because the defendant has been somehow dressed with that power. To some extent the state itself must be involved, or the alleged wrongdoer must be acting under its authority or wielding a power of the sort commonly attached to the state .... *Elders* v. *Consolidated Freightways Corp.*, 289 F. Supp. 630, 633-34 (D. Minn. 1968).

applicable to this case is subsection (3), which provides in pertinent part:

> If two or more persons in any State ... conspire ... for the purpose of depriving, either directly or indirectly, any person ... of the equal protection of the laws, or of equal privileges and immunities under the laws; ... [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Defendants assert that the complaint fails to state a claim under §1985 because it does not sufficiently allege: (1) that a conspiracy existed; (2) that plaintiffs were denied rights protected by federal law or the United States Constitution; (3) that plaintiffs were conspired against because of their membership in a class defined by invidious criteria; or (4) that defendants performed any overt act in furtherance of the conspiracy. Defendants alternatively contend that even if the alleged misrepresentations were the product of a conspiracy, they represent robust political debate protected by the free speech clause of the First Amendment and, therefore, cannot serve as a basis for a cause of action under 42 U.S.C.A. §1985.

At the outset, it should be noted that while the defendant District, as a municipal corporation, is not a "person" subject to suit under §1985(3), *Bosely* v. *City of Euclid*, 496 F.2d 193, 195 (4th Cir. 1974); *Spampinato* v. *City of New York*, 311 F.2d 439, 440 (2d Cir. 1962), *cert. denied*, 372 U.S. 980 (1963); *Steel Hill Development, Inc.* v. *Town of Sanbornton*, 335 F. Supp. 947, 950 (D.N.H. 1971), the three individual defendants can be held liable under §1985(3) for a private conspiracy, even in the absence of any action under color of state law, *Griffin* v. *Breckenridge*, 403 U.S. 88, 96-101 (1971).

Plaintiffs commence their §1985 count with a paragraph incorporating by reference the prior 31 paragraphs relating to

the statement of facts, the allegations of jurisdiction, and the §1983 and Fourteenth Amendment claims. Aside from two paragraphs tracking the language of *Griffin* and §1985(3), and a third paragraph alleging one purpose of the conspiracy, plaintiffs' §1985(3) count sets forth no additional facts concerning the formation of the conspiracy or overt acts in furtherance of it. This complaint is hardly a paradigm of specificity. But given the secrecy that usually envelops the formation and operation of a conspiracy, the liberal standards of Fed. R. Civ. P. 8(a), and the policy against dismissal of civil rights pleadings except in the plainest circumstances, the allegations in paragraphs 18-20 and 30 of concerted action, willful participation, and specified acts of intentional misrepresentation do constitute a minimal statement of the existence of a conspiracy and the commission of one or more overt acts in furtherance thereof. *Cf. Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233-34 (1st Cir. 1977). The individual defendants' objection to the absence of any specific allegations concerning their knowledge of plaintiffs' dealings with the Commissioners is misplaced in light of Fed. R. Civ. P. 9(b), which provides that in a pleading "Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *See* 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶9.03, at 1936 (1975).

It is also necessary to allege under §1985(3) that federally-protected rights have been abridged by defendants' conduct. C. Antieau, *Federal Civil Rights Acts* §96 (1971). The precise nature of the rights allegedly violated is disputed by the parties. But even treating that issue at this stage in the light most favorable to plaintiffs, the Court concludes that plaintiffs' claim of a civil rights conspiracy is undercut by the narrowing by appellate courts of the literal scope of §1985(3).

In *Griffin* v. *Breckenridge, supra*, the Supreme Court held that while §1985(3) reached private conspiracies, a required element is a "racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102 & n.10. Plaintiffs argue that this language in *Griffin* focuses upon the class-based nature of the invidiously discriminatory animus, and does not mandate that a plaintiff

must personally be a member of the target class. The Court of Appeals for the Third Circuit appears to be the only appellate court that has squarely held that a §1985(3) plaintiff need not be a member of the class allegedly discriminated against. *Richardson* v. *Miller*, 446 F.2d 1247, 1249 (3d Cir. 1971). On the other hand, the Court of Appeals for the First Circuit has interpreted the *Griffin* holding to require, first, that §1985(3) plaintiffs must be members of a class readily recognizable or traditionally protected by the Civil Rights Act, and second, that defendants must have conspired against plaintiffs to deny them equal protection *because of their membership in a class* and that the criteria defining that class were invidious. *Harrison* v. *Brooks*, 519 F.2d 1358, 1359-60 (1st Cir. 1975); *Bricker* v. *Crane*, 468 F.2d 1228, 1232-33 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). Indeed, that Court has held that "[t]he requirement that the discrimination be 'class-based' is not satisfied by an allegation that there was a conspiracy which affected the interests of a class of persons similarly situated with the plaintiffs." *Harrison* v. *Brooks*, *supra*. The reiteration of the strict rule of class membership in *Hahn* v. *Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), coupled with a *but see* citation to *Richardson*, leads this Court to the conclusion that the *Richardson* interpretation of *Griffin* has been implicitly rejected as the law of the First Circuit.[4]

Plaintiffs in the instant case can only be characterized as members of a class engaged in the construction and development of a housing subdivision. There is no allegation that

[4] Other courts, relying on *Griffin's* observation that § 1985(3) "was [not] intended to apply to all tortious conspiratorial interferences with the rights of others," 403 U.S. at 101, also have dismissed cases in which either there was no identifiable class or defendants' conduct was aimed at plaintiffs as individuals, not *qua* members of a traditionally-protected class. *E.g.*, *Arnold* v. *Tiffany*, 487 F.2d 216, 217-19 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *Hughes* v. *Ranger Fuel Corp.*, 467 F.2d 6, 10-11 (4th Cir. 1972); *Jacobson* v. *Industrial Foundation of the Permian Basin*, 456 F.2d 258, 259 (5th Cir. 1972); *Kletschka* v. *Driver*, 411 F.2d 436, 447 (2d Cir. 1969); *Kimble* v. *D.J. McDuffy, Inc.*, 46 U.S.L.W. 2408 (E.D. La. Jan. 24, 1978); *Puentes* v. *Sullivan*, 425 F. Supp. 249, 252 (W.D. Tex. 1977); *Smith* v. *Armstrong*, 396 F. Supp. 753, 754 (N.D. Tex.), *aff'd*, 524 F.2d 1231 (5th Cir. 1975).

DesVergnes is a member of a racial minority, or that he and his corporation have affirmatively associated themselves and their proposed housing with such a group. Indeed, plaintiffs strongly contend that their project was *misrepresented* as being linked with low-income, minority housing. In effect, plaintiffs argue that as the innocent-bystander victims of fomented racial prejudice, they should be entitled to claim constructive membership in a similarly-situated racial class that often has been directly subjected to such opprobrium. Though it appears beyond dispute that the animus here was alleged to be both class-based and invidiously discriminatory, plaintiffs lack the inherent, immutable characteristics identifiying that class. Therefore, on the basis of the strict requirements concerning actual class membership that have been ennunciated by the Court of Appeals for this Circuit, I reject plaintiffs' plea for constructive class membership and rule that the logical gap between actual and constructive class membership is insurmountable under any set of facts plaintiffs could prove.

For these reasons, plaintiffs' cause of action under §1985(3) should be dismissed for failure to state a claim upon which relief can be granted.

C. *Fourteenth Amendment*

Plaintiffs' final count, although not separately denominated as such, is based directly on the Fourteenth Amendment. Invoking jurisdiction under 28 U.S.C.A. §1331, plaintiffs claim that defendants' purposeful discrimination abridged their right to equal protection in consideration of their application for inclusion, and offended due process by subverting the regulatory scheme of the District. *Cf. Burt* v. *City of New York*, 156 F. 2d 791, 792 (2d Cir. 1946). Because this claim for federal relief is not frivolous or made solely for the purpose of obtaining jurisdiction, I find that this action arises under federal law for purposes of §1331 and that this Court has jurisdiction to adjudicate whether plaintiffs have stated a claim upon which relief can be granted. *Bell* v. *Hood, supra* at 682-83; *Kostka* v. *Hogg*, 560 F.2d 37, 41 & n.5 (1st Cir. 1977).

At the outset, I rule that the threshold requirement of state action bars any Fourteenth Amendment claim against Mann,

Devine, and Tortolani, regardless of how discriminatory their private conduct may have been. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972); *Shelley* v. *Kramer*, 334 U.S. 1, 13 (1948); *The Civil Rights Cases, supra* at 23. In addition, there is no allegation in the instant case that the State enforced the privately-originated discrimination or otherwise significantly involved itself as a joint participant in invidious discrimination. *Cf. Reitman* v. *Mulkey*, 387 U.S. 369, 380-81 (1967); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); *Downs* v. *Sawtelle, supra* at 8-15. As against the District, plaintiffs have only charged that some of its private-individual members spoke against and then voted down the Heritage proposal. The votes cast by the District's members, as well as their speech and debate at the District meeting, were within the scope of their statutory responsibility to make a quasi-legislative determination on the merits of the Heritage Warrant. *See* 1945 Mass. Acts ch. 381, §13. Accordingly, those votes and that speaking do not provide a basis for holding the District vicariously liable. *See generally Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501-03 (1975); *Tenney* v. *Brandhove*, 341 U.S. 367, 372-79 (1951); *Porter* v. *Bainbridge*, 405 F. Supp. 83, 91 (S.D. Ind. 1975).

Nor is there any basis on these facts for holding the District directly liable. In an opinion by Chief Judge Coffin in *Kostka* v. *Hogg, supra*, the Court of Appeals for this Circuit recently has held, in essence, that an implied right of action for damages against a municipal corporation is not constitutionally compelled under the Fourteenth Amendment and, at best, may be available only when there has been "municipal involvement" in the alleged wrongdoing. *Id.* at 44-45. The Court also refused to fashion a similar remedy under its federal common-law powers, citing the inconsistency of such relief with the doctrine of municipal immunity, established under §1983 by *Monroe* v. *Pape, supra* at 191-92, and its progeny. 560 F. 2d at 44 & n.7. I conclude that none of the allegations concerning the District, its Commissioners, or its voting members amounts to a sufficient charge of "municipal involvement" to serve as a basis for an implied Fourteenth Amendment action for damages. In addition, the holding in *City of Kenosha* v. *Bruno, supra* at 512-13,

that municipal corporations are not "persons" under §1983 for purposes of injunctive relief, suggests that the Court of Appeals, in an appropriate case, would expand *Kostka* to also bar plaintiffs' implied Fourteenth Amendment action for equitable relief, in the absence, as here, of a sufficient allegation of "municipal involvement."[8] *See generally Paul* v. *Davis*, 424 U.S. 693, 701 (1976).

Therefore, plaintiffs' implied cause of action under the Fourteenth Amendment should be dismissed for failure to state a claim upon which relief can be granted.

II

Motions for Attorney Fees

All defendants seek the award of reasonable attorneys fees, in addition to costs and disbursements. The Civil Rights Attorney's Fees Award Act of October 19, 1976, Pub. L. No. 94-559, §2, 90 Stat. 2641, *amending* 42 U.S.C.A. §1988 (1970), provides in pertinent part that:

> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The legislative history clearly indicates that the dominant Congressional purposes were to bridge the anomalous gaps in civil rights law created by the fee-award decision in *Alyeska*

[8] Plaintiffs cite such cases as *Donohoe Construction Co., Inc.* v. *Maryland-National Capital Park and Planning Commission*, 398 F. Supp. 21, 24 & n.2 (D. Md. 1975); *Stephens* v. *City of Plano*, 375 F. Supp. 985, 986 (E.D. Tex. 1974); and *Dahl* v. *City of Palo Alto*, 372 F. Supp. 647, 650-51 (N.D. Cal. 1974), as authority for finding §1331 jurisdiction against a municipal corporation under the Fourteenth Amendment when more than $10,000 is alleged to be in controversy. Since plaintiffs' due process claim is based upon a charge of distortion of the regulatory scheme of the District, *Donohoe*, *Stephens*, and *Dahl* are all distinguishable on their facts as "taking" cases and as such were expressly excepted from the holding in *Kostka* v. *Hogg*, *supra* at 45, that controls the instant case.

Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240, 269-71 (1975), and to enhance private enforcement of all civil rights by authorizing the essential remedy of fee-shifting. *E.g., S. Rep. No.* 94-1011, 94th Cong., 2d Sess. 1-2, 6 (1976), *reprinted in* 5 *U.S. Code Cong. & Ad. News* 5908, 5909-11 (1976). The statute itself provides no precise standard for when a court should exercise its discretion in a situation in which defendants are the prevailing parties. But the Senate, fearful of the deterrence of good faith plaintiffs by the prospect of having to pay the counsel fees of a prevailing defendant, explicitly declared in its report that:

> [A plaintiff], if unsuccessful, could be assessed his opponent's fee only where it is shown that [plaintiff's] suit was clearly frivolous, vexatious, or brought for harassment purposes. [citation omitted]. This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. . . .

Id at 5, in 5 *U.S. Code Cong. & Ad. News, supra* at 5910. While plaintiffs' causes of action have failed to survive the motions to dismiss, the Court is not persuaded that their suit constitutes either frivolous, vexatious, harassing, or malicious litigation. Considering themselves aggrieved as innocent-bystander victims of racial discrimination, plaintiffs did have some basis for bringing suit and for invoking the logical avenues of §§1983, 1985, and the Fourteenth Amendment. *Cf. Goff* v. *Texas Instruments, Inc.*, 429 F. Supp. 973, 976-77 (N.D. Tex. 1977). The fact that the arguments advanced by plaintiffs' counsel failed to address both some of the basics and all of the complexities of suing a municipal corporation and private individuals in a civil rights action does not present a sufficient basis for a finding that the litigation was groundless or unreasonably brought, particularly since some of the claims were not covered by binding precedent of the First Circuit. *Cf. Christiansburg Garment Co.* v. *EEOC*, No. 76-1383, slip op. at 9-10 (U.S. Jan. 23, 1978).

Therefore, in the exercise of the Court's statutory discretion, defendants' motions for the award of reasonable attorney fees should be denied.

III

In light of the Court's allowance of the motions to dismiss, plaintiffs' motion for a preliminary injunction should be denied.

Andrew A. Caffrey, Ch. J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROGER E. DESVERGNES, ET AL,
Plaintiffs

v.

THE SEEKONK WATER DISTRICT,
Defendants

MEMORANDUM AND ORDER

January 10, 1979

CAFFREY, CH. J.

An Order was filed in *DesVergnes* v. *Seekonk Water Dist.*, 448 F. Supp. 1256 (D. Mass. 1978), on April 14, 1978, which dismissed plaintiffs' complaint. A lengthy Memorandum analyzing the reasons underlying the Order was also filed on that date. Thereafter, plaintiffs moved for leave to file an amended complaint which added a Count 3 to the original complaint. The motion to amend was allowed over defendants' objection. Defendants Mann, Devine and Tortolani moved to dismiss the amended complaint on the grounds that Count 3, which purported to state a cause of action under 42 U.S.C.A. §1981, failed to state a claim upon which relief can be granted.

These motions to dismiss were orally argued and briefed by the parties, and, after hearing, I rule that the amended complaint should be dismissed because it fails to state a cause of action within the purview of Section 1981. Plaintiff failed to allege he is a member of any class traditionally protected by Section 1981, *see, e.g., Schetter* v. *Heim*, 300 F. Supp. 1070, 1073 (E.D. Wisc. 1969), or that he is the victim of any class-based animus. The factual basis of the case is spelled out at length in the April 14 Memorandum and need not be repeated herein. Suffice it to say that in dismissing Count 3 the Court has in mind the considerations mentioned in the analysis contained in 448 F. Supp. at 1261-62. I further rule that the cases relied on by plaintiffs in opposition to the motion to dismiss, namely,

Trafficante v. *Metropolitan Life Ins. Co.*, 446 F. 2d 1158 (9th Cir. 1971), *rev'd on other grounds*, 409 U.S. 205 (1972); *Langford* v. *City of Texarkana*, 478 F. 2d 262 (8th Cir. 1973); and *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach*, 493 E.2d 799 (5th Cir. 1974); *see also Warth* v. *Seldin*, 422 U.S. 490 (1975), do not support plaintiffs' contentions herein.

At the time the Court entered the April 14 Order, the United States Supreme Court had not yet decided *Monell* v. *Dept. of Social Service of New York City*, 46 U.S.L.W. 4569 (June 6, 1978). That decision establishes that a municipal corporation is now suable if certain criteria are met. I rule, *sua sponte*, that plaintiffs' Section 1981 cause of action should also be dismissed against the Seekonk Water District for failure to state a cause of action on the basis of which relief may be granted under Section 1981 because there is no allegation in the complaint that can be construed to meet the criteria of *Monell*.

Accordingly, it is ORDERED:

Count 3 of plaintiffs' complaint under Section 1981 is dismissed. Judgment for defendant.

Andrew A. Caffrey, Ch. J.

United States Court of Appeals
For the First Circuit

No. 79-1065

ROGER G. DES VERGNES, et al.,

PLAINTIFFS, APPELLANTS,

v.

SEEKONK WATER DISTRICT,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
BOWNES, *Circuit Judge*,
WYZANSKI, *Senior District Judge.**

Stephen D. Clapp, with whom *Armstrong, Pollis and Clapp*, was on brief, for appellants.
John J. Graham, with whom *William E. Hickey*, was on brief, for appellee.

June 25, 1979

WYZANSKI, *Senior District Judge*. This is an appeal from the District Court's dismissal, for failure to state a cause of action, of a three-count complaint. Plaintiffs contend that their complaint, properly construed, alleges that the defendant with the intent of discriminating against low-income persons and black persons denied plaintiff Heritage's petition to have its real estate included within the Seekonk Water District thus causing damages to plaintiffs, and that such allegations state causes of action under

* Of the District of Massachusetts, sitting by designation.

42 U.S.C. §§1981, 1983, and 1985(3) as well as the Thirteenth and Fourteenth Amendments.

Because Count III, invoking 42 U.S.C. §1981, has the most inclusive and specific allegations, we start with the following summary of and, where necessary, quotations from that count.

Plaintiff Heritage Homes of Attleboro, Inc. is a Massachusetts corporation which owns in the town of Seekonk a parcel of land (called "the locus") abutting upon the land of Seekonk Water District. Plaintiff Roger G. Des Vergnes is president, sole stockholder, and guarantor of the notes of Heritage.

Defendant Seekonk Water District is a municipal corporation created by Mass. St. 1945, c. 381 (hereinafter "the Act"). Other defendants named in the complaint are not appellees in this court. Although the complaint does not quote, it refers to Sections 1 and 13 of the Act.

Section 1 of the Act provides that "the inhabitants of the town of Seekonk liable to taxation in said town and residing within" a specified area of the town "shall constitute a water district and are hereby made a body corporate . . . for the purpose of supplying themselves with water. . . ."

Section 13 of the Act, governing possible enlargement of the District, provides:

> Upon a petition in writing addressed to said board of water commissioners requesting that certain real estate, accurately described therein, located in said town and abutting on said district and not otherwise served by a public water supply be included within the limits thereof, and signed by the owners of such real estate, or a major portion of such real estate, said water commissioners shall cause a duly warned meeting of the district to be called, at which meeting the voters may vote on the question of including said real

estate within the district. If a majority of the voters present and voting thereon vote in the affirmative the district clerk shall within ten days file with the town clerk of said town and with the state secretary an attested copy of said petition and vote; and thereupon said real estate shall become and be part of the district and shall be holden under this act in the same manner and to the same extent as the real estate described in section one.

In February 1976, plaintiff Des Vergnes told the Board of Water Commissioners of the District that Heritage was contemplating purchasing and developing a parcel in the town of Seekonk abutting the District, but the acquisition was dependent upon the District supplying water. The Board members stated that they had plans for including the locus in the District, that there was adequate water, and that inclusion of the locus was a mere formality. In April 1976, relying on these assurances, Heritage bought the locus and Des Vergnes guaranteed the purchase notes.

In accordance with Section 13 of the Act, Heritage addressed a petition to the Board of Water Commissioners to have its locus included within the limits of the District. Thereupon the board issued a warrant for a May 11, 1976 meeting of the voters of the District. Among the items of the warrant, #17 called for a vote on the Heritage petition, and #18 called for a vote on a petition of Monterey Corporation "for the inclusion within the District of a tract of land substantially similar to the locus in proximity, topography, and size" and "in furtherance of development plans substantially similar to those of Heritage" (Count III, par. 16, R. 14).

After the publication of the warrant, Mann, Devine and Tortolani, individual voters of the District, began telling other voting members of the District that the Heritage subdivision would consist of Federally subsidized low-income

housing and/or housing consisting of shacks designed to attract low-income people and/or colored people. (Count III, par. 21, R. 53).

"The discussion which preceded the vote on Heritage's Article #17 disclosed that as a result of the acts of the defendants Mann, Devine and Tortolani the vast majority of the voters present were unalterably motivated by a class-based invidiously discriminatory prejudice and fear concerning Federally subsidized low-income housing, shacks which were designed to attract low-income people and colored people to the town of Seekonk." (Count III, par. 25, R. 56).

"Prior to the vote taken on Article #17 the District's agents, Olean and Benson, informed the members that the District had more than adequate supplies of water to serve both the Heritage and the Monterey subdivisions and that both of the proposed subdivisions met the criteria previously applied by the District for all other applicants." (Count III, par. 26, R. 56)

"The vote[s] of the members of the Water District on May 11, 1976, Article 17 and Article 18 were as follows:

Article 17 (Heritage)	No - 66	Yes - 8
Article 18 (Monterey)	No - 6	Yes - 25"

(Count II, par. 28, R. 56)

"The District's denial of the plaintiffs' request for inclusion was because the voting members believed that the plaintiffs would contract for the sale of houses in the subdivision to black families. The denial of inclusion was also because the plaintiffs had demonstrated in the sale of their North Attleborough property a willingness to contract with black families. The denial was for the purpose of keeping black people out of the District and punishing the plaintiffs for their willingness to contract with black people." (Count III, par. 30, R. 56)

The denial of the Heritage petition injured plaintiff Heritage by making the lots in its parcel of real estate less valuable and injured plaintiff Des Vergnes by adversely affecting his earning power and by causing him to face insolvency presumably because of his losses as an officer, stockholder, and guarantor of the notes of Heritage.

Count III ends with prayers for damages, a preliminary injunction, and a permanent injunction directing the District to extend its boundaries and water supply to include the Heritage locus.

We now consider *seriatim* (1) the correct construction of Count III, (2) whether Heritage has a constitutional standing to sue, (3) whether Heritage has a statutory standing to sue, (4) whether the District as a municipal corporation may be held liable under 42 U.S.C. §1981, (5) whether the District's liability may be premised on a vote of the voters of the District, (6) whether Count III alleges that those voters who on May 11, 1974 voted to deny the Heritage petition had a racially discriminatory intent, and (7) whether plaintiff Des Vergnes has stated a cause of action under 42 U.S.C. §1981.

(1)

In considering whether Count III of the complaint states a cause of action, our first task is to construe it. We must be guided by the following precept stated in *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), a case involving a claimed violation of petitioners' constitutional rights and of 42 U.S.C. §§1981, 1982, and 1983:

> "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."

The materiality of the allegations of Count III must be governed by the fact that 42 U.S.C. §1981, the statute

invoked by that count, is concerned with racial discrimination, not with economic class discrimination or violations of civil rights which have no racial aspect.

The most material allegations of Count III are set forth in paragraph 30 already quoted. It is there averred that the District's denial of Heritage's petition was because of the District voters' belief that plaintiffs would contract to sell houses to blacks and because plaintiffs had demonstrated in the sale of North Attleborough lots a willingness to contract with blacks. It is further averred that the denial was for the purpose of keeping black people out of the District and punishing the plaintiffs for their willingness to contract with blacks.

That paragraph on first impression seems to charge that the District denied the Heritage petition because of the voters' beliefs and because of Heritage's past conduct, not because Heritage had a present intention to sell to blacks in Seekonk. However a close reading shows that the complaint does allege that the denial was in part, at least, on account of Heritage's present intention. The allegation of plaintiffs' willingness to contract with blacks is not limited to willingness at any particular period. The North Attleborough sales are cited as a demonstration of a continuous attitude. When this close reading is taken in conjunction with the general contours of Count III, and construing the pleadings so as to do substantial justice, Fed.R. Civ.P. 8(f), we conclude that the count sufficiently alleges that the District denied the Heritage petition not merely because of what the voters believed but because the plaintiffs in the past were willing and did sell to blacks, and because, in connection with a project currently under construction, they are willing to sell to blacks.

(2)

Heritage has "standing to sue" in the constitutional dimension of that phrase. Heritage has alleged that the

District by denying Heritage's petition caused it to suffer economic injury. In the words of Justice Powell in *Warth* v. *Seldin*, 422 U.S. 490, 517 (1975), the controversy between the parties remained "viable when this complaint" was filed; defendant's denial of the Heritage petition "continued to block a then-current construction project;" and the prayer for an injunction directing the District to extend its boundaries and water supply demonstrates that there "remained a live, concrete dispute when this complaint was filed." Hence there was a "case or controversy" within the meaning of Article III. *Ibid*, pp. 498-499, 517. *Village of Arlington Heights* v. *Metropolitan Housing D. Corp.*, 429 U.S. 252, 263 (1977).

(3)

Heritage also has in the statutory sense standing to sue. 42 U.S.C. §1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The text of §1981 does not explicitly give a cause of action to Heritage inasmuch as it is "a corporation [which] has no racial identity and cannot be the direct target of . . . alleged discrimination," *Village of Arlington Heights* v. *Metropolitan Housing D. Corp.*, *supra*, at p. 263. But that is not the end of the matter.

After the Supreme Court in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) held that the parallel text of 42 U.S.C. §1982 gave a cause of action to a white person against another who had injured the white person

because he had made an assignment of property to a black, lower federal courts held that a white person had a cause of action under §1981 against another who injured him because he made a contract with a black, *DeMatteis* v. *Eastman Kodak Co.*, 511 F.2d 306, modified 520 F.2d 409 (2nd Cir. 1975), or because he protested the racially discriminatory discharge of a black, *Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977), or because he associated with blacks, *Faraco* v. *Clements*, 506 F.2d 956 (5th Cir. 1975).

Those cases stand for two propositions: to invoke §1981 or §1982 one need not be a member of the racial class protected by the statute and one need not even be able to identify any specific member of the class who suffered or may suffer discrimination. In *Sullivan* the court did not rely on the fact that the injured plaintiffs could point to a specific black whose right he was championing. The majority opinion of Justice Douglas, p. 239, derived its *ratio decedendi* from *Barrows* v. *Jackson*, 346 U.S. 249 (1953) where the defendant had been allowed successfully to invoke the Fourteenth Amendment to prevent the enforcement against him of a racially restrictive covenant despite the fact that neither he nor any specifically identified person belonged to the restricted race. The reason enunciated in *Barrows* for giving standing was that since "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court" (p. 257), the defendant was "the only effective adversary," (p. 259). In *Sullivan* (p. 237), Justice Douglas not only quoted that last phrase, but indicated that Sullivan himself had been "punished for trying to vindicate the rights of minorities protected by §1982" not for protecting an identified member of the minorities protected.

From *Sullivan* and from cognate cases under §1981, we conclude that, in order to effectuate the public policy em-

bodied in §1981, and in order to protect the *legal rights* of non-whites expressly created by §1981, a person has an implied *right of action* against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites. *A fortiori* a person has an implied *right of action* against any other person who, with a racially discriminatory intent, injures him because he made contracts with non-whites. Because Heritage comes within each of those two rules it has statutory standing to sue.

That conclusion is directly supported by *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972) and *Kennedy Park House Ass'n* v. *City of Lackawanna*, 436 F.2d 108, 109 (2nd Cir. 1970). Nor is there anything to the contrary in *Warth* v. *Seldin*, (a case where 42 U.S.C. §1981 as well as 42 U.S.C. §§1982 and 1983 was invoked) or *Village of Arlington Heights* v. *Metropolitan Housing D. Corp.*, (which did not involve 42 U.S.C. §1981 but only the Fourteenth Amendment) both *supra*. In neither case was there a plaintiff who had both a constitutional standing to sue and a claim of a statutory right of action under 42 U.S.C. §1981. If there had been a plaintiff who had a live, concrete dispute, Justice Powell in *Warth* v. *Seldin*, at p. 517 said he "possibly would have had standing to seek review." Moreover, in *Village of Arlington Heights*, the court, again speaking through Justice Powell, assumed that a plaintiff which had "met the constitutional requirements" of the "case or controversy" clause of Article III of the Constitution" (p. 263) had the necessary standing to seek review of its Fourteenth Amendment claim and held that the plaintiff failed to prevail solely because it did not prove that the defendant acted with the necessary racially discriminatory intent. If a corporation does have a Fourteenth Amendment right of action when it is excluded for racially discriminatory reasons, the exist-

ence of such right does not, of course, automatically imply that it also had a 42 U.S.C. §1981 right of action, but the reasoning which supports the Fourteenth Amendment right of action tends to support a 42 U.S.C. §1981 right of action.

(4)

There is no doubt that although it is a municipal corporation, the District may be held liable under 42 U.S.C. §1981.

Even before *Monell* v. *Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978), overruling *Monroe* v. *Pape*, 365 U.S. 167 (1961), held that municipal governments are not entitled to an absolute immunity from liability under 42 U.S.C. §1983, the prevailing view was that municipal governments and local governmental bodies were not entitled to absolute immunity from liability under 42 U.S.C. §1981. *Sethy* v. *Alameda County Water Dist.*, 545 F.2d 1157, 1159-1161 (9th Cir. 1976); *Mahone* v. *Waddle* 564 F.2d 1018, 1030-1037 (3rd Cir. 1977); *Garner* v. *Giarrusso*, 571 F.2d 1330 (5th Cir. 1978). After the decision in *Monell*, it is incontrovertible that a water district does not enjoy an absolute immunity from liability under 42 U.S.C. §1981.

(5)

We next consider whether the District's liability may be premised on a vote of the voters of the District.

Section 13 of Mass. St. 1945 c. 381 gives to the "voters" the power to grant or deny a petition to enlarge the Seekonk Water District. Although the Act does not define the term "voters", it indisputably means legal voters of the Town of Seekonk who are "inhabitants of the town of Seekonk liable to taxation in said town and residing within the territory" of the District. Mass. St. 1945 c. 381, §§1, 8, 9, 10, 11, 13 and 14.

When as a body the voters act upon petitions for inclusion, they are acting on behalf of both the District and

the Commonwealth. That they act upon behalf of the District is indicated by the facts that they assemble at a District meeting called by the Board of Water Commissions to vote on an article in the warrant which calls the meeting and warns them that the petition will be the subject of a vote. In this aspect the voters are acting like a body of stockholders of a private corporation to which, by statute, may be given the authority to act for the corporation on major matters such as a merger or a mortgage of all the assets. That the voters act also upon behalf of the Commonwealth of Massachusetts and the Town of Seekonk is indicated by the facts that the vote is to be reported to the town clerk, and, far more important, that their vote, if favorable to a petition signed by less than all the owners of real estate proposed to be included in the District, may subject to taxation under Section 7 of the Act against their will persons not already members of the District.

In acting upon behalf of the District with respect to Section 13 petitions, the voters are not agents subject to superiors within the corporate hierarchy. In such matters the acts of the voters "may fairly be said to represent official policy." *Monell* v. *Department of Social Services of The City of New York*, *supra*, at p. 694. Therefore if the majority of the District voters deny a petition, the intent of that majority constitutes the official policy of the District.

(6)

The next question is whether Count III alleges that those voters who on May 11, 1974 voted to deny the Heritage petition were racially motivated.

Paragraph 25 of Count III (like par. 23 of Count I which we consider later) alleges that the vast majority of the voters present [on May 11, 1974] were unalterably motivated by a class-based invidiously discriminatory prejudice and fear concerning Federally subsidized low-income hous-

ing, shacks which were designed to attract low-income people and colored people to the town of Seekonk.

This averment alleges both an economic and a racial bias. As *Village of Arlington Heights* v. *Metropolitan Housing D. Corp., supra,* at pp. 265-266 reminds us, rarely is a legislature or administrative body motivated by a single purpose, and when there is proof that a discriminatory purpose has been one of the motivating factors, there is cause for inquiry in a Fourteenth Amendment case. Here we have a body of voting citizens, not a legislature, and we have a case under 42 U.S.C. §1981, not under the Fourteenth Amendment. But the reminder in *Arlington Heights* is relevant, and leads us to conclude that plaintiffs' complaint adequately alleges that defendant's denial was racially motivated.

If the matter were doubtful, the doubt is put at rest by paragraph 30 which alleges that "The denial was for the purpose of keeping black people out of the District."

(7)

While Heritage has persuaded us that the District Court erred in dismissing as to it Count III of its complaint, the case is otherwise with respect to the individual plaintiff Des Vergnes.

"The personal insolvency of and loss of future earning power of Des Vergnes" (Count III, paragraph 33) may be indirect consequences of the denial of Heritage's petition, but such indirect consequences do not give Des Vergnes a constitutional or statutory standing to sue defendant for breach of the District's duty under §1981. *Warth* v. *Seldin, supra,* at p. 509.

(8)

We now turn to consider Heritage's Count I claim based on 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereto to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

We are mindful that in Count I there is no equivalent to the allegation in paragraph 30 of Count III upon which we relied in construing and determining the adequacy of Count III. But virtually all the other allegations are repeated.[1] There can be no doubt that Count I does allege that Heritage met the criteria applied to Monterey Corporation and all other previous applicants for inclusion in the District (Count I, par. 23, R. 46), and that the voters of the District who voted against Heritage "were unalterably motivated by a class-based invidiously discriminatory prejudice and fear concerning 'Federally subsidized, low-income housing,' 'low-income' people, and/or colored people."

Under the general standard of construction we have been admonished by *Warth* v. *Seldin* to follow in civil rights cases, we construe Count I as alleging that one of the reasons the District rejected the Heritage petition was because of intentional racial discrimination.

Upon the basis of that construction, we now consider whether Heritage has stated a cause of action under §1983.

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[1] Unlike paragraph 21 of Count III, paragraph 18 of Count I alleges that in their statements to other voting members of the District, Mann, Devine, and Tortolani "began intentionally and knowingly misrepresenting to other voting members of the District that the Heritage subdivision would consist of 'Federally subsidized low-income housing' and/or housing consisting of 'shacks' which were designed to attract 'low-income' people and/or 'colored' people to the town of Seekonk." We construe that ambiguous averment as not denying that plaintiffs' intent was to sell to minorities, but saying that what they would sell would be better than shacks.

It does not matter that Heritage is not an individual. Corporations are persons whose rights are protected by 42 U.S.C. §1983, *Safeguard Mutual Ins. Co.* v. *Miller*, 472 F.2d 732, 733 (3rd Cir. 1973); *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 436 F.2d 108 (2nd Cir. 1970); *Dailey and Columbia Sq. Inc.* v. *City of Lawton, Okl.*, 425 F.2d 1037 (10th Cir. 1970). They are also persons who, under the Fourteenth Amendment, have a constitutional right to the equal protection of the laws. *Ibid.*

Heritage has with respect to its §1983 claim the necessary constitutional standing to sue. There is an Article III case or controversy between Heritage and the District because Heritage alleges that it has sustained an economic injury "fairly traceable to the defendant's acts or omissions." *Village of Arlington Heights* v. *Metropolitan Housing D. Corp., supra*, at p. 261.

Here our reasoning is precisely the same as it was when we considered Heritage's constitutional standing to sue on the basis of its §1981 claim.

Heritage's statutory standing to sue on the basis of its §1983 claim is not a perfect parallel to Heritage's statutory standing to sue on the basis of its §1981 claim. Heritage's §1983 claim is founded on "the deprivation of . . . [some person's] rights secured by the Constitution."

"Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way to compel or encourage racial segregation." *Adickes* v. *Kress & Co.*, 398 U.S. 144, 151-152 (1970). Therefore a State may not punish a non-white for having social contacts with a black. *Ibid.* Likewise it may not through one of its creatures, punish or discriminate against a corporation for its willingness, past or present, to make contracts with blacks.

And if it does so, then the person so punished or discriminated against has a §1983 right of action. *Crow* v. *Brown*, 457 F.2d 788 (5th Cir. 1972) aff'g 332 F.Supp. 382, 384 (N.D. Ga. 1971); *Dailey and Columbia Sq. Inc.* v. *City of Lawton, Okl., supra*, at p. 1038.

For the reasons given in our discussion of §1981, the District is not absolutely immune from an action brought against it under §1983. *Monell* v. *Department of Social Services of the City of New York, supra.* If the voters, acting on behalf of the District to establish its policy, had an intent to discriminate on racial grounds against Heritage, Heritage has a §1983 right of action against the District.

We, therefore, conclude that Heritage is entitled to a reversal of the District Court's judgment dismissing its claim under Count I. But for the same reasons his claim under Count III was inadequate, Des Vergnes' claim under Count I fails, and he is not entitled to a reversal of the District Court's judgment.

(9)

There remains for consideration plaintiffs' claim set forth in Count II. The Count II claim is bottomed on 42 U.S.C. §1985(3) which provides:

> If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . (and) if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

That statute is addressed to conspiracies which have a class-based, invidiously discriminatory basis. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

The only place in Count II where plaintiff Heritage refers to a conspiracy is paragraph 33, which reads:

> The defendants Mann, Devine, and Tortolani and the District conspired against the plaintiffs because of their belief that the plaintiffs were members of, or closely allied with, or indistinguishable from a class of persons defined by invidious criteria.

In the present context of this case we need not decide whether plaintiffs have alleged a cause of action under §1985(3), a claim which raises difficult questions of construction as well as of standing and conspiracy law. Subsequent to the filing of this appeal, by agreement among the parties, the private defendants—Mann, Devine, and Tortolani—were dropped as defendants from the suit. Thus the chief benefit of §1985(3) to a plaintiff, the ability it gives him to reach the conduct of private individuals and not merely state actors, is no longer pertinent to this case. The sole conspirator now a party to this case is the District, and Heritage's claim of its violation of the Fourteenth Amendment can be fully litigated and, should the plaintiff prevail, remedied under the §1983 claims.

Judgment as to Des Vergnes affirmed. Judgment as to Heritage Homes of Attleboro, Inc. affirmed as to Count II, but as to Counts I and III reversed and remanded for further proceedings not inconsistent with this opinion.

Adm. Offices, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HERITAGE HOMES OF ATTLEBORO, INC.,
Plaintiff,

v.

THE SEEKONK WATER DISTRICT,
Defendant.

MEMORANDUM

September 3, 1980

CAFFREY, CH. J.

After remand this matter came before the Court for further proceedings.

In 1977 a three count complaint was filed by plaintiff Heritage Homes and its president, Roger DesVergnes against the Seekonk Water District (the District) and three individual defendants. The complaint alleged that Heritage Homes' application for inclusion of its land in the Seekonk Water District was denied by the District with the intent to discriminate against black or low income persons in violation of 42 U.S.C. §§1981, 1983, 1985(3) and the thirteenth and fourteenth amendments of the United States Constitution.

In its orders of April, 1978 and January, 1979 this Court dismissed the complaint and the amended complaint for failing to state a cause of action *DesVergnes* v. *Seekonk Water District,* 448 F.Supp. 1256 and *DesVergnes* v. *Seekonk Water District,* 463 F.Supp. 686. After an appeal was filed the three individual defendants were dropped from the suit leaving only the District as appellee. The Court of Appeals affirmed the judgment of dismissal as to DesVergnes on all counts and as to Heritage Homes on Count II. However the Court ruled that Heritage Homes had stated a claim against the District under 42 U.S.C. §1983 (Count I) and also under §1981 (Count III), *DesVergnes* v. *Seekonk Water District,* 601 F.2d 9 (1979).

In its decision the Court of Appeals ruled (1) that the complaint set forth a "case or controversy" within the meaning of Article III; (2) that Section 1981 creates an implied right of action for Heritage Homes against any person who with racially discriminatory intent injured it because it had contracted with black persons in the past; (3) that Heritage Homes also has standing under Section 1983 because a State may not discriminate against a corporation for its willingness to contract with blacks; (4) that a municipal corporation such as the district could be held liable under both Section 1981 and Section 1983, and (5) that the district's liability under Sections 1981 and 1983 could be premised on a vote of the voters of the district because a majority vote could fairly be said to represent official policy.

On the basis of the foregoing rulings the case was remanded and further proceedings consisting of a two day non jury trial were held. I find and rule as follows.

LIABILITY

Plaintiff, Heritage Homes is a corporation engaged in the business of real estate development. Its president and sole shareholder is Roger DesVergnes. At some time prior to February, 1976 Heritage Homes became interested in developing approximately 150 acres of land in Seekonk, Massachusetts known as Pritchard Farm. Although plaintiff envisioned the ultimate development and sale of about 145 lots, the development and sale of only 30 homes would make the land purchase economically feasible.

I find that the plaintiff's acreage abutted the Seekonk Water District and that in February, 1976 prior to the purchase of the property Roger DesVergnes went to the water district office and met with the District's Superintendent Roger Wilbur. DesVergnes later had a second meeting with Wilbur and several water commissioners. At both meetings the possibility of including plaintiff's land in the Seekonk Water District was discussed. DesVergnes was advised that Heritage Homes could not apply for inclusion in the district until it purchased the

property but that there was no water shortage and that the district had hoped to extend the main water line in the direction of the Pritchard Farm as part of its normal expansion.

In April, 1976 plaintiff purchased the property for three hundred thousand dollars. It paid fifty thousand dollars in cash and financed the balance with a purchase money mortgage from the Taunton Cooperative Bank. The land included eight house lots on Miller Street for which no Planning Board approval was required under the subdivision control law.

On the other side of Miller Street there was a subdivision known as Fieldwood Estates which at that time contained one hundred houses and now contains between one hundred twenty-five and one hundred fifty homes. Fieldwood Estates was in the water district.

Shortly after the purchase Roger DesVergnes returned to the water district office to apply for inclusion of plaintiff's land in the water district. At that time he discussed with the Superintendent the appropriate method of extending the main water line and the distribution of costs incident to that extension. The Superintendent stated that the extension would benefit the district, improve water pressure in the Fieldwood Estates development and reduce taxes. DesVergnes was also informed that inclusion in the water district was not necessary for seven of the lots on Miller Street upon which Heritage Homes intended to build because as to those lots plaintiff would be allowed to tap into the existing main just as three other houses on the same side of Miller Street had done.

On May 1, 1976 percolation tests were performed on thirty of plaintiff's street lots. Present on the property that day were the Seekonk Building Inspector, two Seekonk Selectmen and the real estate broker who had an exclusive sales contract for the proposed development. One of the two selectmen was present because he had received phone calls from members of the community expressing concern that Heritage Homes intended to build low income housing on the property or concern that HUD financing would be available to purchase the proposed houses. The callers were afraid that a lower class of

people or undesirable people would be attracted to Seekonk as a result of the project.

Mr. DesVergnes took the two selectmen to North Attleborough to show them a development of homes identical to those planned for the Seekonk acreage. The selectmen told him that they did not want Heritage Homes to continue with its Seekonk project because it would attrack blacks and Puerto Ricans from East Providence to Seekonk.

Between May 1 and May 11, 1976, the Building Inspector received nine or ten telephone calls from people he knew to be residents of Fieldwood Estates in which he was informed of a rumor that plaintiff planned to build HUD housing for low income families and that such a development would attract blacks and Hispanics to Seekonk. The callers asked what the Building Inspector planned to do to slow down the development.

At the same time Roger DesVergnes began getting threatening phone calls in which he received warnings not to continue with the development and threats that it would be burned down.

On May 11, 1976 a water district meeting was held. Included on the agenda for the meeting was Article 17, a motion to include the property of Heritage Homes in the water district and Article 18, a motion to include another 125 acres of land, owned by the Monterey Corporation in the district. The Monterey Corporation land was destined for the development of homes in the $45,000 to $49,000 price range compared to the $33,900 price projected by Heritage Homes.

The meeting was attended by a larger crowd than usual with eighty to eighty-five water district members present. When Roger DesVergnes arrived with his brother they sat in the last row of seats. From there they were able to overhear various conversations in which the voters were discussing among themselves the Heritage Homes project. The gist of these conversations was that the builder was planning to put in "Section 232" housing; that the project would bring in black people from nearby East Providence; that water district members would have to sell their houses at a loss because they didn't

want colored people in Seekonk; and that the subdivision must be stopped if the voters were to protect the value of their property.

When Article 17 was reached it was read aloud by water commissioner James Olean who recommended that the voters act favorably on it. He advised those present that there was enough water to service both the Heritage Homes property and the property of Monterey Corporation described in Article 18. He moved for the approval of Article 17 and his motion was seconded. The floor discussion of Article 17 lasted twenty-five to thirty minutes with a number of voters speaking against it and none in favor of it. It became apparent that many had attended the meeting for the sole purpose of defeating Article 17. One speaker said that he understood that the houses proposed by Heritage Homes would bring black people to the area. Another man asked where the builder was. When DesVergnes understandably hesitated to identify himself the man demanded to see the builder who planned "to put up this low income housing in this town." DesVergnes then stood up but when he was asked by the same voter "What kind of shacks are you going to build in this town?" DesVergnes lost his temper and responded that it was none of the questioners business. DesVergnes then left the meeting. The voters defeated Article 17 by a vote of sixty-six to eight.

According to district records no one else has ever been denied inclusion in the water district in its thirty-two year history. The Superintendent testified that voter acceptance would have benefitted the voters economically. The water commissioners who testified could not explain why Article 17 was voted down.

Immediately after the defeat of Article 17, forty-three voters left the meeting. Those who remained approved Article 18 to expand the district so as to include therein the land of Monterey Corporation.

After leaving the water district meeting the DesVergnes brothers were scheduled to appear before the Seekonk planning board in a routine building permit application. Quite a few people arrived before them and asked many questions about

the Heritage Homes project. As a result the Planning Board had some difficulty keeping the meeting in order. When the DesVergnes brothers arrived they were followed by a large group of people many of whom had come directly from the water district meeting. The meeting hall was not big enough to hold the crowd.

Jean Nelson, owner of the Monterey Corporation testified that there was a group of Fieldwood residents at the meeting who were members of an organized neighborhood telephone network designed to "get out the vote" on certain issues. She testified that one woman appeared to be leading that group. People in the rear of the hall were overheard to say "We stopped him at the water district and we'll stop him here." A woman who did not recognize Roger DesVergnes and his brother told them "if we don't stop this thing here tonight . . . you will have all the niggers in town." Those attending the meeting were informed by the Chairman of the Planning Board that approval of the application was a routine Planning Board procedure.

At some point after May 11, 1976 the Planning Board issued the building permits. Because it had been denied inclusion in the water district Heritage Homes proceeded to construct only the seven houses on Miller Street for which it had been advised that inclusion in the district was unnecessary because the existing main could be tapped. Construction of five of the seven houses was financed with loans from the Taunton Cooperative Bank. The other two were built with Heritage's own funds. Within three to four weeks Heritage had the seven houses completely framed. Five of them had been completed through the plastering stage. Two were closed, roof-tight, plumbing in and ready for plastering. Money had been drawn out on the five construction loans and Heritage's own funds had been put into the other two houses.

At about that time DesVergnes learned that Heritage Homes would not be allowed to tap the existing water lines and that the promised water would not be available. Superintendent Wilbur told him that a mistake had been made and that the seven houses could not have water unless they were within

the District although three other houses on the same side of Miller Street as those houses and not within the District had been allowed to tap the same existing main. Heritage had already found buyers for all seven of the houses.

Heritage Homes made four subsequent applications for inclusion in the water district. The first three were denied and it was refused a hearing on the fourth. After the third denial in December, 1976 Heritage Homes investigated alternative sources of water. It hired a consultant to investigate the possibility of digging one artesion well to service a number of homes. By the spring of 1978 after three test holes had been drilled it was determined that the water supply was inadequate to accommodate such a well. Heritage finally hired a well driller to drill individual wells for each lot.

However, while standing unoccupied for two years, the seven houses had been severely vandalized. As soon as the wells were drilled, Heritage repaired the damage and the seven houses were sold. Altogether Heritage Homes has built and sold thirty houses on the street frontage portion of its property.

I find based on *overwhelming* evidence that the water district's refusal to include plaintiff's land within its boundaries was motivated solely by racial considerations. In making this finding I am particularly mindful that in the thirty-two year history of the District no other applicant ever has been refused admission and that all the factors usually considered important in making such a determination favored a decision opposite to the one reached by the water district.

DAMAGES

During the two year delay in construction and sales which resulted from the racially discriminatory acts of the Seekonk water district, plaintiff claims that it suffered damages of $169,325.70 as follows:

Vandalism	$ 14,000.00
Interest on construction loans	17,095.31
Real estate taxes on lots	4,366.51
Real estate taxes on land	14,573.87
Interest on land loan	47,124.57
Installing wells	72,165.44
Total:	$169,325.70

I rule that the $47,124.57 in interest paid on plaintiff's land loan should be excluded and that the amount should be further reduced by $28,475.00 which is the amount that Heritage Homes would have paid to supply the thirty houses with water if they had been rightfully included in the water district.[1] The amount should be further reduced by that portion of the real estate taxes which is attributable to the undeveloped acreage that plaintiff still owns.

On the basis of the foregoing I find that the additional cost to plaintiff which resulted from the wrongful acts of the water district was actually less than $100,000. I further find that by upping the sale price of the thirty houses from the original price of $33,900.00, plaintiff's receipts from its total sales have been increased by $248,840.00.[2]

Clearly therefore even if inflationary factors were to be considered, plaintiff has effectively passed its losses on to the buyers of its homes.

However such a distribution of losses should not result in a windfall to the Seekonk water district. In order to discourage the obviously racially discriminatory policy of that district and as a warning to others, I therefore rule that the Seekonk water district should pay $100,000.00 in punitive damages to the plaintiff.

I further rule that the district must extend its boundaries to include Heritage Homes property in the event that Heritage

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[1] Roger DesVergnes testified that if included in the district it would have cost only $125,000 to provide the seven houses on Miller Street with water and $1,200.00 for each of the other lots.

[2] Roger DesVergnes testified that plaintiff's sales total $1,265,840.00 while total sales at the original price would have been $1,017,000.00.

Homes or its successors should decide to continue its development in accordance with the zoning by-laws currently in effect. Heritage Homes is to file such an application within 30 days of the date of this opinion and if it does so, the District must expand its boundaries within 90 days from its receipt of such a request in writing from Heritage Homes.

Order accordingly.

Andrew A. Caffrey, Ch. J.

United States Court of Appeals
For the First Circuit

No. 80-1646

HERITAGE HOMES OF ATTLEBORO, INC.,

PLAINTIFF, APPELLEE,

v.

THE SEEKONK WATER DISTRICT,

DEFENDANT, APPELLANT.

No. 80-1704

HERITAGE HOMES OF ATTLEBORO, INC.,

PLAINTIFF, APPELLANT,

v.

THE SEEKONK WATER DISTRICT,

DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH, *Circuit Judge*
WYZANSKI, *District Judge*.*

John J. Graham, with whom *William E. Hickey* was on brief, for The Seekonk Water District.

Stephen D. Clapp, with whom *Armstrong, Pollis and Clapp* was on brief, for Heritage Homes of Attleboro, Inc.

March 31, 1981
As Amended by Order Dated May 18, 1981

COFFIN, *Chief Judge*. This case returns to us after the district court found that there was overwhelming evidence to support the allegations that we previously found to have stated a claim. *See Des Vergnes* v. *Seekonk Water District*, 601 F.2d 9 (1st Cir. 1979). Heritage Homes is a corporation engaged in

* Of the District of Massachusetts, sitting by designation.

real estate development. It sued the defendant Seekonk Water District for refusing — because Heritage was willing to sell homes to black persons — to include a Heritage development within the District and thus to supply the development with water. The district court found the District liable under 42 U.S.C. §§ 1981 and 1983. It refused to award Heritage compensatory damages because "plaintiff has effectively passed its losses on to the buyers of its homes." Nonetheless it awarded $100,000.00 in punitive damages against the District "[i]n order to discourage the obviously racially discriminatory policy of the District." Both sides appeal. Since the nature of the claim is explained in our earlier opinion, here we add only such facts as become necessary to explain our reasoning.

Considering first the District's appeal, we briefly respond to those arguments by the District that merit comment. First, we have previously decided the District's arguments drawn from *Village of Arlington Heights* v. *Metropolitan Housing Development*, 429 U.S. 252 (1977), and *Warth* v. *Seldin*, 422 U.S. 490 (1975). *See* 601 F.2d at 13.

Second, the District asserts that, because the actions of the Town Planning Board are not within the control of the District, the district court's reference to events at a Board meeting was "immaterial." The Board meeting took place immediately following a District meeting. Both were forums for expressions of hostile and incriminating opinion against Heritage's real estate development. Such circumstances permit an inference that persons opposing the development left the earlier meeting to attend the later one. Community attitudes and events can become relevant when "the acts of voters 'may fairly be said to represent official policy.' " 601 F.2d at 15. Ironically, elsewhere in its brief the District criticizes the district court for failing to appreciate "the necessity for considering much more than random scraps of a [District] proceeding to determine what happened." We do not think that the district court erred by referring to the entire context to assess the plaintiff's charge of racial motivation.

Third, the District claims that evidence of statements made at the District meeting was hearsay and thus improperly admitted. With one exception, the District did not object to the admission of this evidence. The single exception related to evidence that was offered on at least two other occasions without objection. We thus review for plain error, and have difficulty in finding any error at all. Our examination of these statements indicates that they were not offered to prove the truth of the matters they assert. For instance, one witness testified to hearing a person at the meeting state the developers would "bring all of the black people from East Providence to this project." Such statements demonstrate that those at the meeting made or heard racially hostile remarks prior to voting against the real estate development. *See* Fed. R. Evid. 801(c) & 803. The fact, not the truth of the assertion, is the critical element. The District's other evidentiary arguments either are inconsequential or seek to retry disputes of fact whose resolution is properly within the discretion of the finder of fact.

Fourth, the District's argument that its "decisionmaking process ... is ... not subject to evaluation" is foreclosed by *Owen* v. *Independence*, 445 U.S. 622 (1980) (no qualified immunity for § 1983 municipal defendants), since the District does not explain how it differs from a municipality for this purpose.

Finally, the odious character of the discrimination in this case is a sufficiently "aggravating circumstance[]" *Fact Concerts, Inc.* v. *Newport*, 626 F.2d 1060, 1067 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3443 (1980), to support the award of punitive damages. The record in this case was adequate to permit the finder of fact to conclude that the District engaged in a deliberate and remarkably overt display of racial discrimination. Although we share our dissenting brother's concern that courts ought not too quickly levy punitive damages against public bodies, we are struck by the thought that insulating such bodies (even where the improper motive,

as here, is "overwhelmingly established") would result in allowing the most blatant discrimination to avoid the risk of punitive damages so long as there is open participation, while punishing only minions who act beyond the confines of council rooms. This would be a particularly ironic result in cases where actual damages are trivial, as they often are in cases of racial discrimination.

Turning to Heritage's appeal on its injury award, we note that it suffered two types of damages due to the District's discrimination: increased water supply costs and an approximate two year delay from 1976 to 1978 in developing the housing investment. The former cost arose from the need to drill private wells for each lot instead of simply connecting each to the District's water supply. The latter resulted from Heritage's efforts to persuade the District to admit it and, this failing, from its search for an adequate alternative water supply.

The first cost is measured by subtracting the expense to which Heritage would have been put in connecting with the District from the total cost of drilling the individual wells. The district court figured this cost to be $43,690.44 (calculated by subtracting $28,475.00 from $72,165.44). Heritage does not challenge this sum.

The second alleged cost arises from the fact that Heritage was forced to invest in assets during a time when it would have preferred to complete its development and sell out. This asserted damage would be the value attributed to the loss of use of the funds during the period when Heritage was reasonably precluded from selling the property. The conventional measure is the appropriate interest rate. In this case, assuming that Heritage moved with reasonable diligence to obtain the alternative water supply, the record lacks not only evidence of the appropriate interest rate but, more importantly, evidence that the appreciation in value of the property over the entire period was less than what interest on the

amount invested would have yielded. We therefore have no alternative but to hold that compensatory damages attributable to loss of use of money were not proven.

Heritage consequently has succeeded in proving actual damages of $43,690.44. Its failure to prove more simply confines the award to this sum, and does not, as the district court thought in its "passing on losses" analysis, cancel out the damages that Heritage *has* demonstrated.

Finally, Heritage requests prejudgment interest on its compensatory damages. It acknowledges that prejudgment interest in civil rights cases is not mandatory in this circuit. *Furtado* v. *Bishop*, 604 F.2d 80, 98 (1st Cir. 1979). It argues, however, that prejudgment interest is required to make injured parties whole when the injuries they suffer are not "intangible". *Id.* at 97. We agree, noting that this normally will be a matter within the sound discretion of the district court and that "in appropriate circumstances compensatory principles must be tempered by an assessment of the equities." *Cargill, Inc.* v. *Taylor Towing Service, Inc.*, No. 80-1084, slip op. at 5 (8th Cir. Mar. 3, 1981). Since the equities of this case do not mandate further tempering, we remand this case to the district court for entry of an award of $43,690.44 plus prejudgment interest on compensatory damages. In all other respects the district court's judgment is *affirmed*. Plaintiff is awarded costs, to include counsel fees in this court, the amount of the latter to be determined by the district court in connection with the pending motion for fees in that court.

ALDRICH, *Senior Circuit Judge* (dissenting in part).

I agree with the court that the District's improper motive was overwhelmingly established. In this circumstance this is a classic case for considering punitive damages in the true punitive sense. However, I am troubled by the concept that

beneficial owners, or customers, of a quasi public utility, or the taxpayers in a municipality, should be punished for actions over which they had, at best, only remote control. A few of the members of defendant District voted against this particular conduct; it appears that most did not vote at all. Nevertheless, the court, bringing to fruition its indication in *Fact Concerts* v. *City of Newport*, ante, would have these members extensively punished, when their very maximum offense would seem to be negligence. I would think the burden of compensatory damages and attorney's fees enough.

Alternatively, this type of case does not seem to me an appropriate medium to further the deterrent aspect of punitive damages. I wonder how likely this example will serve to get out the voters in some other, unconnected, organization and make them "vote right."

Finally, punitive damages is a highly subjective matter. However improper the conduct in the present case, it is not to be overlooked, when considering the applicability of the principle to this type of defendant, that the mere possibility that some jury may award punitive damages may have a more deterrent effect upon the freedom to vote than that freedom should be burdened with. In sum, I share the thoughts of the district court in *Valcourt* v. *Hyland*, D.Mass., 1980, 503 F.Supp. 630, 637-40, and would vacate the punitive damage award.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1646

HERITAGE HOMES OF ATTLEBORO, INC.,
Plaintiff, Appellee,

v.

THE SEEKONK WATER DISTRICT,
Defendant, Appellant.

No. 80-1704.

HERITAGE HOMES OF ATTLEBORO, INC.,
Plaintiff, Appellant,

v.

THE SEEKONK WATER DISTRICT,
Defendant, Appellee.

ORDER OF COURT

Entered March 31, 1981

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The cause is remanded to the district court for the entry of an award of $43,690.44 plus judgment interest on compensatory damages. In all other respects, the district court's judgment is affirmed.

Plaintiff is awarded costs to include counsel fees in this court, the amount of the latter to be determined by the district court in connection with the pending motion for fees in that court.

In the matter of execution of judgment, stayed by order of the court on March 26, 1981, the district court is authorized to vacate the stay insofar as it would apply to a judgment for compensatory damages, but in view of the fact the Supreme Court has granted certiorari in the somewhat similar case of *Facts Concerts, Inc.* v. *Newport*, 626 F.2d 1066, 1067 (1st Cir. 1980), cert. granted, 49 U.S.L.W. 3443 (1980) as to punitive damages, if defendant wishes, and will proceed promptly to seek certiorari from or affirmance of that judgment, the stay of execution in that respect shall remain pending action by the Supreme Court in that case, and thereafter until further order of the district court.

Mandate is to issue forthwith.

By the Court:

/s/ Dana H. Gallup
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1646.

HERITAGE HOMES OF ATTLEBORO, INC.,
Plaintiff, Appellee,

v.

THE SEEKONK WATER DISTRICT,
Defendant, Appellant.

No. 80-1704.

HERITAGE HOMES OF ATTLEBORO, INC.,
Plaintiff, Appellant,

v.

THE SEEKONK WATER DISTRICT,
Defendant, Appellee.

Before Coffin, *Chief Judge,*
Aldrich, *Circuit Judge,*
and Wyzanski, *District Judge.**

ORDER OF COURT

Entered May 18, 1981

Our opinion in this case is modified according to the printed opinion that we issue today. The Seekonk Water District's Motion to Recall Mandate for Purpose of Entertaining

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* Of the District of Massachusetts, sitting by designation.

the Petition for Rehearing is constructively granted. The Petition for Rehearing is hereby denied and mandate is constructively hereby reissued. We deny the Motion to Extend Stay of Execution of Entire Judgment in light of our order of March 31, 1981.

By Court:

/s/ Dana H. Gallup
Clerk.

United States Court of Appeals
For the First Circuit

No. 80-1646

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLEE,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLANT.

No. 80-1704

HERITAGE HOMES OF ATTLEBORO, INC.,
PLAINTIFF, APPELLANT,

v.

THE SEEKONK WATER DISTRICT,
DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

ON REMAND FROM THE SUPREME COURT

Before
COFFIN, *Chief Judge*,
ALDRICH, *Circuit Judge*,
WYZANSKI, *Senior District Judge*.*

Stephen D. Clapp and *Armstrong, Pollis and Clapp* on memorandum on remand for Heritage Homes of Attleboro, Inc.
William Hickey, John J. Graham, Fred M. Vinson, Jr., Kenneth C. Bass, III, and *Reasoner, Davis & Vinson* on memorandum on remand for the Seekonk Water District.

January 25, 1982

COFFIN, *Chief Judge*. When we last considered this protracted case we upheld the district court's finding that

* Of the District of Massachusetts, sitting by designation.

Seekonk Water District had violated 42 U.S.C. §§ 1981 & 1983, modified its holding that Heritage Homes had failed to prove compensatory damages, and affirmed its award of punitive damages against the District. 648 F.2d 761 (1st Cir. 1981). Subsequently, in *City of Newport* v. *Fact Concerts, Inc.*, 49 U.S.L.W. 4860 (June 26, 1981), the Supreme Court held that a municipality is immune from punitive damages under 42 U.S.C. § 1983. On petition for a writ of certiorari, the Court vacated our prior judgment in this case and remanded it to our court "for further consideration in light of" *Fact Concerts*. We now reverse the district court's award of punitive damages against the Water District, a municipal corporation under state law, but reaffirm all other aspects of our prior opinion.

Heritage Homes makes two arguments on remand. First, it stresses that *Fact Concerts* involved the bad faith actions of public officials whereas the present case deals with the malicious conduct of the voting taxpayers themselves. Second, it argues that *Fact Concerts* dealt with municipal immunity under § 1983 and that both the history and policy underlying § 1981, which is an alternative cause of action in this case, preclude municipal immunity.

As support for its first argument, Heritage Homes claims that this case falls within the Court's caveat that punitive damages might be available against a municipality in "an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights." *Fact Concerts, supra*, 49 U.S.L.W. at 4865 n.29. Although the finding of the district court that there was "overwhelming" evidence that the Water District was motivated by racial considerations seems to us well supported by its account of the blatantly racial discussions that took place preceding the vote to exclude Heritage Homes from the District, we conclude that the facts of this case do not fit into any exception that the Court is likely to carve out of its broad holding that "a municipality is immune from punitive damages under 42 U.S.C. § 1983." *Id.* at 4866. Of the

thousands of members of the Water District,[1] only some 80 to 85 attended the crucial meeting. Of these 66 voted to exclude and 8 voted to include Heritage Homes. Absent widespread knowledgeable participation by taxpayers, the analogy to municipal officials seems apt: to award punitive damages against the Water District would not serve the purposes of punishment or deterrence. As the Court observed, "blameless or unknowing" taxpayers would be punished by imposing punitive damages here. The actions of a small claque of voters would burden several thousand non-participants, many of whom presumably were unaware of the entire controversy.

If the theory is that most of the taxpayers knew that a group of voters intended to discriminate but wanted to disassociate themselves by staying away from the meeting, this raises a number of troubling questions. How much did they know? How serious was the threat? When must a citizen or taxpayer attend a meeting or remain away, vote or abstain, at his or her peril? Without a more compelling showing, we have no doubt that the Court would reaffirm its reasoning that "[n]either reason nor justice suggests that ... retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.* at 4865.

With respect to the reality of deterrence, the chance that 66 voters would be deterred at a meeting by the knowledge that punitive damages, if finally assessed, would be shared by several thousand taxpayers, is as much "deterrence in the air" as imposing punitive damages against a municipality for the actions of its officials. Awarding punitive damages

[1] The precise number of residents in the District is not clear from the record. In its Memorandum on Remand, the Water District states that it had 13,500 residents at the time; but from the record it appears that 13,500 is the population of the Town of Seekonk, of which the Water District comprises only a portion. Heritage Homes has not objected to the assertion by the Water District, nor has it provided its own figure. The exact number of members of the District is not crucial to our holding, though this might be a different case were there only 100 members instead of several thousand.

against the offending voters would seem to be "a more effective means of deterrence." *Id.* Moreover, the argument that punitive damages would encourage nonvoting taxpayers to participate and oppose actions which violate the Constitution is not persuasive in the absence of proof of broad public awareness that malicious conduct is very likely to take place. And the same series of expansive questions recognized in connection with punishment must also be confronted here.

Heritage Homes' second argument is that any municipal immunity under § 1983 should not apply to violations of § 1981. In light of *Fact Concerts* we conclude that "both history and policy" support municipal immunity from punitive damages under § 1981. While § 1981 was enacted five years earlier than § 1983, Heritage Homes has failed to point to any legislative history, nor are we aware of any, which indicates that Congress intended to overturn the common law rule that municipal liability "did not extend to the award of punitive or exemplary damages."[2] *Id.* at 4865. Even the proposal in 1871, embodied in the rejected Sherman amendment, to extend municipal liability for *compensatory* damages met with resistance; and its supporters specifically disavowed the goal of punishment for a governmental entity. We add that, had Congress crossed any Rubicon of municipal punitive liability five years earlier in connection with § 1981, this fact would most probably have surfaced in the 1871 debate.

However strong the policies underlying § 1981, our earlier analysis indicates that imposing punitive damages against the Water District would not serve to punish or deter the responsible actors. We are not only bound by the holding of *Fact Concerts* but must also defer to its reasoning; and the Court's discussion of the rationale for levying punitive damages leaves no room for distinguishing § 1981 from

[2] While the one jurisdiction (New Hampshire) which had awarded punitive damages against a municipality before 1866 had reversed itself in 1870, we doubt that this change would alter the Court's view that the common law generally provided immunity from such damages, even in 1866.

§ 1983. *See id.* at 4865-66. In particular, the Court's concern with not imposing huge financial burdens on municipalities is equally applicable to § 1981. While in the aggregate there may be fewer suits under § 1981 than under § 1983, the Court's reasoning applies even to a single case like this one: since the unlimited taxing power of a municipality can be taken into account in fashioning the amount of punitive damages, there is a likelihood of extremely large awards which would not only strain local treasuries but might also curtail public services. "Absent a compelling reason for approving such an award, not present here, we deem it unwise to inflict the risk." *Id.* at 4866.

We are aware that at least one court has accepted the argument that *Fact Concerts* should not be construed to apply to § 1981. *Boyd* v. *Shawnee Mission Public Schools*, No. 78-2080 (D. Kan. Sept. 23, 1981). We are not persuaded by its reasoning. The district court in *Boyd* relied in part on its view that the federal courts have traditionally treated §§ 1981 and 1983 "as totally distinct and as independent causes of action." While at one time courts had held municipalities liable under § 1981 in spite of the Court's holding in *Monroe* v. *Pape*, 365 U.S. 167 (1961), that municipalities enjoyed absolute immunity under § 1983, this different treatment was based upon the explicit language of the statutes: § 1983 stated that no "person" shall deprive another of federal rights, and a municipality was not thought to be a "person" for this purpose, whereas § 1981 contains no similar limitation. *See Sethy* v. *Alameda County Water Dist.*, 545 F.2d 1157, 1159-60 & n.5 (9th Cir. 1976). In any case *Monroe* has since been overruled so that municipalities no longer enjoy blanket immunity under either provision. *See Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).

The district court also relied upon the Supreme Court's dictum in *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 460 (1975), that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief,

including ..., under certain circumstances, punitive damages." The two cases cited for this proposition, *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir.), *cert. denied*, 393 U.S 940 (1968), and *Mansell* v. *Saunders*, 372 F.2d 573 (5th Cir. 1967), both held that punitive damages could be imposed against government officials for violations of § 1983; neither case involved a suit against a municipality or mentioned § 1981. The Court's citation of these cases thus implies that it equates the analysis of punitive damages under the two provisions, which in light of *Fact Concerts* casts grave doubt on the validity of the dictum as applied to municipalities.

We therefore reverse that part of the district court's judgment awarding punitive damages against the Seekonk Water District. Since the rest of our prior opinion is unaffected by the Court's holding in *Fact Concerts*, we reaffirm our other conclusions.

No costs to be assessed for this phase of the proceedings. Other costs and counsel fees are to be awarded to plaintiff as we indicated in our prior opinion.

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 80-1646

HERITAGE HOMES OF ATTLEBORO, INC.,
Plaintiff, Appellee,

v.

THE SEEKONK WATER DISTRICT,
Defendant, Appellant.

No. 80-1704

HERITAGE HOMES OF ATTLEBORO, INC.,
Plaintiff, Appellant,

v.

THE SEEKONK WATER DISTRICT,
Defendant, Appellee.

JUDGMENT

Entered January 25, 1982

This cause came on to be submitted on remand from the Supreme Court of the United States on appeal from the United States District Court for the District of Massachusetts.

That part of the district court's order that awarded punitive damages against Seekonk Water District is reversed;

That part of this court's order of March 31, 1981, that remanded the cause to the district court for the entry of an award of $43,690.44 plus judgment interest on compensatory damages and our order with respect to costs and counsel fees are reaffirmed;

In all other respects, the order of the district court is affirmed; and

No costs are awarded for this phase of the proceedings.

By the Court:

Clerk.